SUPREME COURT, U. S.
FILED
NOV 17 1975
MICHAEL RODAK, JR., CLERK

No. 75-438

In the Supreme Court of the United States

OCTOBER TERM, 1975

POTTAWATOMIE TRIBE OF INDIANS,
THE PRAIRIE BAND OF THE
POTTAWATOMIE TRIBE OF INDIANS, et al., *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY

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et al. petitioner

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Although the respondent in its "Memorandum for the United States in Opposition," Nos. 75-438 and 75-458, states that this Prairie Band Petitioner . . . "initially contends (Pottawatomie Pet. 9-10) that the Court of Claims erred in finding that the Indian tribes parties to the Greeneville Treaty have not established aboriginal title to lands in Royce Area 11 . . . " (Res. Memo., p. 3), respondent must be confused with what was contended by other petitioners. On the contrary, this petitioner contended that "the treaty of Greeneville, being an early treaty involving many tribes, cannot be judged with the same theories of title, i.e. 'aboriginal,' 'recognized' as those treaties which followed many years later, when

tribes had been actually removed by the United States to the confines of strict perimeters."

Respondent proceeds by referring to its Memorandum in Opposition in No. 75-389 and again to the test of aboriginal title, all of which is not responsive to the arguments in the Prairie Band of Pottawatomie's Petition (Res. Memo. p. 3).

Respondent then refers to the lower Court as having upheld the Commission's finding that no close and intimate political and social confederacy sufficient to invoke the exception to the general rule existed among the claimant tribes, i.e. two or more tribes can establish aboriginal title to an area if they shared the land in a close "joint and amicable" relationship (Strong Pet. App. A., pp. 6-7). See *Sac & Fox Tribe of Indians of Oklahoma v. United States*, 315 F 2d 896, 903 n. 11, certiorari denied, 375 U.S. 921. We disagree with the respondent's statement which follows: "The essential factual question whether this determination was supported by substantial evidence does not warrant further review." (Res. Memo. p. 4)

When one reads the treaty journals and the Greeneville Treaty itself, there can be little doubt that this evidence is substantial and compelling in proof of the joint and amicable relationship that existed between the signatory tribes and that the tribes felt strongly that the lands belonged in common to all of those who signed the treaty. [Lowrie and Clarke, eds., American State Papers, Indian Affairs, Vol. 1, pp. 562-582, Dft. Ex. 31, 7 Stat. 49; see also Pet. Ex. #95, Dkt

27-B, 89, 252, 335, 338 American State Papers, Vol. I, I A pp. 340-342; see also Prairie Pottawatomie Pet. pp. 10-14.]

Further on in its Memorandum, respondent falsely implies that this petitioner claims aboriginal title is protected by the Fifth Amendment (Res. Memo. p. 4). The fact is that this petitioner asserted that the Courts below by applying the faulty theory of aboriginal title to the facts in this case and by disregarding the theory of common ownership and joint and amicable possession in the tribes who ceded these lands, deprives this and other petitioners of their rights under the Fifth Amendment (Pottawatomie Pet. p. 8).

Respondent's argument that petitioner is premature in our argument about the relative compensable interest does not warrant serious consideration by this Court (Res. Memo. pp. 4-5). Respondent misses the thrust and pertinence of this petitioner's contention that the relative compensable interest in Royce Area 11 of the twelve Indian tribes who signed the Treaty of Greeneville is to be found in the treaty itself and should be divided accordingly. Respondent knows as does this Court that we are dealing in this phase of the case with the question of "title," other terms for which are "compensable interest" or "liability." The question before the Court is title in whom; or what tribes have a compensable interest, and in what proportion to one another. Therefore, the question of relative compensable interest is cer-

tainly not premature, and is properly before the Court on interlocutory appeal. It is the questions of how the land shall be valued, and the actual determination of the value of the lands that are not before this Court in the interlocutory appeal.

As regards respondent's arguments directed to this petitioner's contentions as to title in Royce Areas 21, 22 and 23 (Michigan), being three of the enclaves referred to in the treaty, respondent does little more than reiterate the finding of the lower courts (Res. Memo. pp. 5-6). No response is attempted to this petitioner's argument that by failing to adopt the concept of joint ownership which implies a division of the consideration of the lands in accordance with the treaty, an almost impossible burden will inevitably be placed on the lower courts in the next phase of this case when a method of valuation of the enclaves relative to the larger Royce Area 11 must be determined. See statement of Anthony Wayne that the reservations around the posts . . . (are) . . . "of much greater consequence to the interest of the United States than the proposed relinquishment of territory" (i.e. Royce Area 11), (Prairie Pottawatomie Pet. pp. 13-14).

It is suggested that in this case the Indian Claims Commission applied the theory of aboriginal title to a situation where it is obviously not appropriate; and to a treaty cession that because of the very early period in which is was negotiated (1795); because of the number of tribes involved; and for many other

reasons, was unique. Such a unique problem deserves a solution somewhat different from that followed by the courts in the Indian treaty claims cases of later date between only one or a few tribes. The lower courts, because of a failure to perceive this or a lack of courage, have failed to adopt the obvious and realistic solution to the problems posed by the facts.

This Court is now provided with the opportunity to resolve this issue in an equitable manner that may be easily implemented by the lower courts in resolving an otherwise almost impossible problem.

Conclusion

For the reasons stated above, as well as those stated in the Petition for Writ of Certiorari, this Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 14th day of November, 1975, all parties required to be served have been served by depositing the required copies of this "Petitioner's Reply" in a United States post office or mail box, with airmail postage prepaid, namely to the following:

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